

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

IN RE: CAPITAL ONE CUSTOMER . Civil Action No. 1:19md2915  
DATA SECURITY BREACH .  
LITIGATION, . Alexandria, Virginia  
June 5, 2020  
10:00 a.m.  
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE JOHN F. ANDERSON  
UNITED STATES MAGISTRATE JUDGE  
(via ZoomGov)

APPEARANCES:

FOR THE PLAINTIFFS: NORMAN E. SIEGEL, ESQ.  
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THE CURRENCY:

(APPEARANCES CONT'D. ON PAGE 2)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES: (Cont'd.)

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1 P R O C E E D I N G S

2 THE COURT: We'll go ahead and have the clerk call  
3 the case, please.

4 THE CLERK: In re: Capital One Customer Data Security  
5 Breach Litigation, Civil Action No. 19md2915.

6 THE COURT: And who do I have for the plaintiffs?

7 MR. SIEGEL: Good morning, Your Honor. This is  
8 Norman Siegel, co-lead counsel for the plaintiffs; and with me  
9 this morning are Lindsay Perkins and Jillian Dent.

10 MS. PERKINS: Good morning, Your Honor.

11 THE COURT: Good morning.

12 Mr. Siegel, who's going to be arguing on behalf of  
13 the plaintiffs?

14 MR. SIEGEL: Ms. Perkins, who had to pound the  
15 briefing, will, will take the lead on the argument this  
16 morning.

17 THE COURT: Okay. Thank you, Ms. Perkins.

18 And who do I have for Capital One?

19 MR. BALSER: Good morning, Your Honor. David Balser  
20 from King & Spalding on behalf of Capital One.

21 MS. ZINSNER: Good morning, Your Honor. Mary Zinsner  
22 with Troutman, cocounsel for Capital One.

23 THE COURT: Mr. Balser, are you going to be arguing  
24 on behalf of Capital One?

25 MR. BALSER: Yes, Your Honor. And Ronni Solomon, my

1 partner, is also with me in case there are any issues about the  
2 log itself.

3 THE COURT: Okay. Thank you.

4 Okay. And here on behalf of the agency defendants?

5 MS. LEVENSON: Good morning, Your Honor. Rebecca  
6 Levenson from the U.S. Attorney's Office in the Eastern  
7 District of Virginia. With me is Peter Koch, agency counsel  
8 for the Office of the Comptroller of the Currency.

9 MR. KOCH: Good morning, Your Honor.

10 THE COURT: Good morning. Is Mr. Koch going to argue  
11 on behalf of the two agencies?

12 MS. LEVENSON: I will, Your Honor.

13 THE COURT: You will? Okay. All right.

14 Well, I want to focus the parties' discussions. I've  
15 read all the papers and I appreciate them, got them read,  
16 including all of the replies that I got, and have read the  
17 cases. On the -- so the initial issue on whether this federal  
18 law privilege on bank examination can be applied in this case,  
19 you know, I've, I've read the three cases that the plaintiffs  
20 have relied upon indicating -- arguing that state law would  
21 control and that there is no Virginia state law privilege, and,  
22 you know, I, I don't find them to be persuasive, honestly.

23 I think this is a case that's significantly different  
24 than the three cases that were cited. The *SBAV LP v. Porter*  
25 *Bancorp* case, the Kentucky case, the court in that case took

1 the what I consider to be a fairly extraordinary step of  
2 vacating the decision once the case had been resolved, which,  
3 you know, is, is different than it just being, sitting as  
4 having been appealed but not decided. I mean, the judge took  
5 the affirmative step to vacate that.

6 The *Michigan* case, you know, you read that case  
7 closely, it's clear that the documents were created under the  
8 Michigan act and the Michigan law was going to apply there.  
9 That obviously was a state credit union or credit union.

10 And in *In re Powell*, the decision in that case, the  
11 Vermont bankruptcy court also, you know, obviously dealt with  
12 the state institution and even in its decision went through and  
13 said that, you know, I'm going to say it doesn't apply, and  
14 then it dealt with, well, even if it did apply, it wouldn't  
15 necessarily come into play in this case.

16 So looking at those three cases, I don't think that  
17 the law is as clear as maybe the plaintiffs would have made it  
18 out to be, and Federal Rule of Evidence 501 isn't absolute. It  
19 indicates that there can be some analysis other than what  
20 actually state law does apply.

21 In this case, we've got a national bank. We've got  
22 the Federal Reserve and the Comptroller -- Office of the  
23 Comptroller coming in who are federal agencies overseeing a  
24 national bank, and in this case, we've got, you know, I know  
25 it's very complicated, conflict of laws issues in this case,

1 but in the representative complaint, there are -- it's not just  
2 Virginia claims raised in the representative complaint, the  
3 claims having to do with the laws and various other  
4 jurisdictions from some of the representative plaintiffs:  
5 Texas, Florida, California, and several other states.

6           So for all of that, I am going to find that it's  
7 appropriate to allow the assertion of the bank examiner  
8 privilege by the Federal Reserve and the Office of the  
9 Comptroller, but, you know, we have to recognize that this is a  
10 qualified privilege. It doesn't include factual information.  
11 The party asserting the privilege has the burden to show that  
12 it is appropriate under the circumstances.

13           You know, now that the dust has cleared a little bit,  
14 we have the Federal Reserve and the Office of the Comptroller  
15 of the Currency who come in, have indicated that they want to  
16 assert the bank examiner examination privilege in this case,  
17 want to have the opportunity to do that, and I -- you know, it  
18 is their privilege to assert, it's not Capital One's privilege,  
19 and so I think that that procedural issue has now been resolved  
20 and that those two agencies have come in and made a timely  
21 request to assert that privilege, and I'm going to find that  
22 it's appropriate to allow them to do that under the  
23 circumstances.

24           So with all that said, it sort of, I hope, focuses,  
25 you know, the discussion that we can have this morning, you

1 know, what do we do now, in that, you know, I think under both  
2 the, the two circuit court cases that I think the parties both  
3 have cited and relied on, the *Bankers Trust* case and the -- out  
4 of the Sixth Circuit and the D.C. case having to do with the  
5 subpoena served on the Comptroller of the Currency, you know,  
6 all sort of lead me to believe that we have to give the  
7 agencies the opportunity when they timely assert their request  
8 to make a privilege objection to at least go through that  
9 process, see where it shakes out, and then it's up to the Court  
10 to decide if the parties can't agree as to whether the agencies  
11 have appropriately asserted the privilege, whether the material  
12 that they're asserting it for is covered by the privilege, and,  
13 you know, obviously, understanding that it's not an absolute  
14 privilege; it's a qualified privilege.

15 So with all that said, I need to get some guidance  
16 from both the plaintiffs, Capital One, and the agencies as to  
17 what are our next steps under those circumstances.

18 So I'll hear from the plaintiffs first.

19 MS. PERKINS: Thank you, Your Honor. Lindsay Todd  
20 Perkins. It's nice to be with you this morning.

21 So I, I do appreciate the Court laying out its views  
22 on some of the initial arguments that the plaintiffs made, and  
23 now we can get right to the -- right to the chase of it. So we  
24 do -- we do all agree now that it's the agencies' privilege to  
25 assert and it's their burden to establish that it applies to

1 each document and the specific contents therein.

2           The agencies have not met their burden to do so.  
3 Instead, they have not reviewed any of the documents at issue,  
4 taking Capital One's word for it that the documents contain  
5 information deemed confidential by agency regulation.

6           That is a far cry from establishing privilege. While  
7 the agencies and Capital One often conflate confidentiality  
8 under the regulations with privilege under the federal common  
9 law, they do not dispute that the concepts are not one and the  
10 same and that the privilege is narrower than the agencies'  
11 confidentiality designations under the regulations.

12           The privilege only covers agency opinions and  
13 recommendations and the bank's response thereto. Accordingly,  
14 it arguably applies to bank examination and inspection reports,  
15 of which the agencies say there are 19 being withheld by  
16 Capital One, and direct communications between an agency and a  
17 bank regarding supervision, which Capital One says there are  
18 561 of such documents, only 10 percent of the total e-mail  
19 communications that Capital One is withholding.

20           Even for these, as many courts have found when  
21 reviewing such documents in camera, even inspection reports,  
22 the quintessential agency opinion and recommendation contains  
23 plenty of purely factual information that is not privileged and  
24 must be produced.

25           As for the vast majority of the documents that are



1 internal Capital One communications, there is no basis to  
2 assume, as the agencies appear to ask this Court to do, that  
3 these internal communications contain agency recommendations  
4 and opinions or Capital One's responses thereto.

5 As set forth in plaintiffs' papers, Capital One is  
6 withholding a much broader swath of documents than any court  
7 has concluded privileged. The cases analyzed bank examination  
8 reports and direct communications with regulators for  
9 privilege.

10 Courts that have addressed the issue, such as the  
11 *Wultz* court in the Southern District of New York, have  
12 explicitly rejected the contention that the privilege applies  
13 to internal bank communications, which again is the vast  
14 majority of the documents that are being withheld. That's  
15 because the agencies have not demonstrated the privilege  
16 applies to any document being withheld. All documents being  
17 withheld on the basis of the bank examination privilege should  
18 be ordered to be produced.

19 At a minimum, though, even if the Court believes  
20 agencies should be given some short but reasonable additional  
21 amount of time to review the documents to which privilege might  
22 apply, the Court should still order the immediate production of  
23 the internal Capital One communications, and as many courts  
24 have recognized, where a protective order in the case will  
25 protect the confidentiality of bank examination material, the

1 policy behind the privilege will be upheld.

2 Now, a separate issue that, that the agencies and  
3 Capital One argue is dispositive even before suggesting that  
4 the Court even get to the bank examination privilege is to  
5 whether the agencies' regulations that set forth a process for  
6 requesting documents from the agencies require plaintiffs to  
7 request the documents in Capital One's possession directly from  
8 the agencies instead. The only circuit court to address this  
9 issue is the Sixth Circuit in *In re Bankers Trust*. In that  
10 case, the court addressed the issue here. When a party to  
11 civil litigation requests documents from their party opponent  
12 that are by regulations the property of the federal agencies,  
13 do those regulations control over the federal rules?

14 The court said no. If documents are within --

15 THE COURT: In that case -- Ms. Perkins, in that  
16 case, and it's unclear what they mean by a letter was sent, but  
17 in that case, a letter was sent by the requesting party to the  
18 agencies, and the agencies said no, and then they went through  
19 and tried to get the documents through discovery; isn't that  
20 right?

21 MS. PERKINS: That's correct, Your Honor, but the  
22 fact that the plaintiffs had sent a letter to the agencies was  
23 really a reference made by the court in its statement of the  
24 facts of the case that ultimately had no bearing on the court's  
25 analysis of the legal issue. In fact, the court seemed to

1 believe that the plaintiffs had not exhausted their  
2 administrative remedies, that they had sent the letter and that  
3 as soon as the request was denied, they moved away from the  
4 agency process and went straight to requesting the documents  
5 from their party opponent, the bank, and the court said that  
6 was appropriate under the circumstances because Rule 34  
7 applies.

8           It applies to civil litigation, and Rule 34 already  
9 kind of contemplates some of the issues that the agencies  
10 suggest must be delved into through their regulations, and the  
11 court said that those regulations clearly conflict with the  
12 Federal Rules of Civil Procedure, and under such circumstances,  
13 there is no reason that plaintiff should have to move around  
14 their party opponent who is in possession of the documents and  
15 request them from the agency.

16           And that's especially so because the agencies'  
17 regulations protect confidential material, but they're not  
18 entitled to withhold production of confidential material.  
19 Confidential material is passed back and forth in litigation  
20 all the time, subject to appropriate protection. Now, what's  
21 required for the agencies to actually put a stop to the  
22 production of material is that it be deemed privileged.

23           And the court in *Bankers Trust* recognized this  
24 interest, that the agencies are the ones that have the  
25 privilege and they are entitled to assert it and they should be

1 allowed to intervene for that purpose, which they have done so  
2 here, but that doesn't mean that the agencies' procedures  
3 should control over the Federal Rules of Civil Procedure. So  
4 that's the circumstance we have here.

5 And moreover, plaintiffs cited the case from the  
6 Southern District of Ohio, *Local 295 Pension Trust v. Fifth*  
7 *Third Bank*, where the court stated that even if the agencies'  
8 regulation should typically be enforced where the agencies have  
9 intervened in the case and thus have received the very notice  
10 and opportunity to protect their interests that the regulations  
11 provide, there is no basis to require that a requesting party  
12 to divert courts and request the documents from the agencies  
13 under a procedure at odds with the federal rules, and that's  
14 the circumstance we have here.

15 Under *Bankers Trust*, plaintiffs are not required to  
16 request the documents from the agencies under their procedures.  
17 Notably, there are four different agencies at issue. They each  
18 would require the plaintiffs to request documents directly with  
19 each different agency, so we would have four different  
20 processes going for documents that the agencies admit are not  
21 in their possession, the vast majority of which would never  
22 have been in their possession because they're internal Capital  
23 One communications.

24 So even if the Court were concerned about the  
25 agencies' interests that are protected by those regulations,

1 now that the agencies have intervened to protect those  
2 interests, there is no reasoned basis to require plaintiffs to  
3 request the documents under the agencies' procedures.

4           So to get to your -- to the Court's ultimate  
5 question, where do we go from here, it is plaintiffs' position  
6 that where plaintiffs sent this discovery to Capital One in  
7 January, the agencies acknowledged that Capital One at some  
8 point reached outside to them to say, look, we've got these  
9 discovery requests that essentially implicate agency  
10 confidential information, agencies said this happened in April,  
11 so we're now two months from there, we think -- plaintiffs  
12 think that the agencies have had enough time to assess whether  
13 the privilege applies, and instead of coming to the Court and  
14 saying privilege applies to these documents, this portion of  
15 this document for this reason, they have simply taken Capital  
16 One's word for it that the documents contain confidential  
17 information, not necessarily privileged information, and that  
18 at this point, they've -- not that they've waived the right,  
19 but they have passed, they have -- they have not met their  
20 burden to establish that the privilege applies to any  
21 particular documents or to the specific contents thereof,  
22 because as most of the courts recognize that are actually  
23 dealing with privilege, even very -- documents that are  
24 prototypical bank examination documents contain even mostly  
25 factual material.

1           So at a minimum, if the Court thinks that agencies  
2     should be given some amount of additional time, it should be a  
3     limited amount of time, and they can attempt to assert  
4     privilege over those limited 19 bank examination reports and  
5     561 direct communications with the regulators, and that there  
6     is really no basis to assume that the privilege applies to the  
7     vast majority of the remaining documents at issue. They're  
8     internal Capital One documents.

9           THE COURT: Help me understand that a little better.  
10    I mean, if, if an internal Capital One communication discusses  
11    the bank examiner, the results of a bank examination and/or a  
12    need to provide some supplemental information as to that  
13    request and -- why wouldn't that be subject to a privilege if  
14    the bank examination report is subject to privilege?

15          MS. PERKINS: That's correct, Your Honor.  
16    Theoretically, a communication could just transcribe  
17    essentially the recommendations and opinions that were in a  
18    report and the bank's statements in response, and if that were  
19    the case, there wouldn't be an obvious basis to say  
20    categorically that a communication even internal could not  
21    satisfy the privilege, but again, there's been no attempt to  
22    even make that showing, and even the agencies recognized in  
23    their reply that there are a lot of internal communications at  
24    issue, they haven't seen them, and they acknowledge that those  
25    wouldn't even be considered confidential information under the

1 regulation.

2 And so we're at this point all taking Capital One's  
3 word for it, and that's simply not how privilege law works.  
4 The party that has the privilege is required to justify the  
5 withholding of relevant and discoverable information on the  
6 basis of the privilege.

7 And it is important to note that under the  
8 regulations, all this confidential information is deemed the  
9 property of the agencies, and they at any point could have  
10 asked Capital One in the last two months or even before, before  
11 when these discovery requests were sent out, let's take a look  
12 at these documents to see if it actually implicates our  
13 interests, and instead, we're here now a month before all  
14 document production is supposed to have been complete, and the  
15 agencies are just now saying in general there is likely  
16 confidential and possibly privileged information in these  
17 withheld documents, and that's simply insufficient to satisfy  
18 the burden to show privilege applies.

19 And again, most of all the cases that actually dig in  
20 on privilege say, you know what? Even if privilege applies, so  
21 long as there's a protective order entered in the case that  
22 will ensure that the privileged material does not make it out  
23 into public view, the policy behind the bank examination  
24 privilege is fully upheld, and that's even more so if it's just  
25 agency confidential information as opposed to material that

1 fits within the smaller, narrower category that applies to the  
2 bank examination privilege.

3           So for that reason, Your Honor, we think there is no  
4 basis to allow the agencies even more time to assert the  
5 privilege, but if it does, it should really only be under the  
6 subset of documents that clearly could implicate the privilege,  
7 as opposed to the much broader swath of documents that Capital  
8 One is withholding on the basis of privilege.

9           THE COURT: Okay.

10           MS. PERKINS: Unless Your Honor has any further  
11 questions --

12           THE COURT: No, I'm going to hear from Mr. Balser  
13 now. Mr. Balser?

14           MR. BALSER: Your Honor, let's start with two  
15 overarching principles here. The first is that federal law  
16 prohibits Capital One from producing information that the  
17 regulators deem confidential. We've had no choice under these  
18 regulations but to withhold documents that fall within the  
19 confidentiality rubric under the applicable regulations and to  
20 log those, which we've done. We would be subject to criminal  
21 sanctions if we produced these documents without agency  
22 authorization.

23           I think the key point here, Your Honor, and I think  
24 it addresses most of what plaintiffs argued here, is that the  
25 plaintiffs have jumped the gun. They're aware of the *Touhy*



1 process. They chose to ignore it. They filed a motion two  
2 days after we provided them with our categorical log, and they  
3 seek to establish precedent that litigants can bypass the *Touhy*  
4 process at will.

5 That is a very, very dangerous precedent that they  
6 are asking this Court to create and one that would have  
7 implications far beyond this case, especially for the Eastern  
8 District of Virginia that deals with extremely sensitive state  
9 secret issues, CIA issues, and the like.

10 So the argument that, that the agencies haven't met  
11 their burden to designate these documents as privileged is  
12 absurd. There is a process by which the plaintiffs are  
13 required to seek agency input and guidance imposition on  
14 privilege, and they, they just completely chose to bypass that  
15 process.

16 We told them in a letter -- they -- first of all,  
17 they've known about this issue since Day One. The regulations  
18 are clear as to what the process is for invoking the agencies'  
19 review of challenged documents, and we told them in a letter  
20 specifically who they should contact at our primary regulators  
21 at the OCC and FRB to comply with the *Touhy* process. They just  
22 didn't do it.

23 And there's not a single case that they can point to  
24 that stands for the proposition that the *Touhy* process can be  
25 ignored. They rely on *Bankers Trust*, but as Your Honor

1 correctly noted, in that case, the *Touhy* process was followed.

2 THE COURT: We don't know -- we don't know that the  
3 *Touhy* process was followed. All we know is that a letter was  
4 sent. We don't know any more than that.

5 And, you know, it's clear from -- you know, this is a  
6 case not where the plaintiffs have subpoenaed the agency, not  
7 where they're asking for the agency to present someone to come  
8 in and testify. They have sent a document request to Capital  
9 One. It involves a number, a large number of documents that  
10 the agency doesn't even know, doesn't even have any idea, so  
11 that if it was, you know, I want to get certain documents, they  
12 don't even know what the documents are. They don't have them  
13 in their possession.

14 So the idea that this, you know, one can't subpoena  
15 documents from a party in a case and deal with that issue in  
16 the context of litigation, which is where we are right now, I  
17 don't think is absurd, Mr. Balser.

18 MR. BALSER: Once they know, Your Honor, that, that  
19 certain documents that are within their Rule 34 request are  
20 subject to bank examiner privilege, there is a process under  
21 the federal regulations that they are required to follow, and  
22 they didn't follow it.

23 THE COURT: Okay. Where do we go from here,  
24 Mr. Balser?

25 MR. BALSER: So, look, I think where we go from here

1 is that -- and we've had -- I've had some brief discussions  
2 with, with counsel for the agencies on this. I think we should  
3 engage in an expedited process to permit the agencies to  
4 conduct a review in a -- probably using some kind of sampling  
5 in a way that would expedite the process to enable --

6 THE COURT: If they're going to assert a privilege  
7 over a document, a sampling doesn't work. I mean, that's clear  
8 in the decisions that you have cited. It has to be done on a  
9 document-by-document basis; isn't that correct?

10 MR. BALSER: So -- it is, Your Honor, but -- you  
11 know, and I'll let the agencies speak for themselves as to the  
12 process that they propose to invoke. Your Honor is correct, it  
13 is the agencies' privilege. I think there's no disagreement  
14 about that, but I do think we, we are trying to find a solution  
15 that provides the agencies with the ability to exercise their  
16 right to assert privilege on these documents consistent with  
17 the schedule that we have in this case.

18 And, you know, I would note, Your Honor, that, you  
19 know, our regulators did come in, and they have stated in  
20 their, in their briefs their position that internal documents,  
21 including documents that discuss the -- that refer or reflect  
22 supervisory communications, are protected, and if you look at  
23 page 21 of, of the regulators' brief, they say that examination  
24 reports, supervisory correspondence, and internal Capital One  
25 documents referring to or reflecting supervisory communications

1 and findings contain agency opinions and recommendations and  
2 banks' responses thereto, which are protected from disclosure  
3 by the bank examination privilege.

4 So our regulators have, have come in and said that  
5 our internal communications around the log are appropriately  
6 withheld under privilege, and it is, it is --

7 THE COURT: Well, Mr. Balser, they have not said  
8 that. They have said documents that contain that type of  
9 information they would think are privileged. We don't know --  
10 they don't know what are in the thousands of the e-mails that  
11 you have withheld from production.

12 And I'm concerned about the process that was  
13 followed. I mean, there's a lot of discussion of, you know,  
14 we've made an analysis under the bank examination privilege.  
15 You don't tell me what it was that that analysis was. You just  
16 say: We've made an analysis.

17 It appears from reading it closely that it may be  
18 just if there is an e-mail from a Capital One person to a  
19 regulator or a regulator is discussed in an e-mail, that  
20 apparently, you know, that's being withheld, and, you know,  
21 I'll tell you when push comes to shove, that's not going to be  
22 an appropriate analysis, and that's going to be up to the  
23 agencies to make that final determination.

24 But, you know, if, if the -- the first cut is is it  
25 an e-mail to an agency, it contains some type of confidential

1 or privileged information, that's not a proper analysis.

2 MR. BALSER: Well, Your Honor, Ms. Solomon is on the  
3 phone. She, she -- on the line. She is the person who  
4 supervised the logging -- review and logging of all these  
5 documents, and she can speak more specifically as to the  
6 process that was used.

7 I, I do think, as Your Honor points out, at the end  
8 of the day, this is, this is a sticky situation for Capital  
9 One. We face criminal sanctions if we produce documents that  
10 the agency believes are protected. So we've been careful,  
11 obviously, in ensuring that we don't do that.

12 And as Your Honor notes, it is the agencies'  
13 privilege ultimately and there should be a process, that had  
14 plaintiffs follow the *Touhy* process, as they're required to do,  
15 we probably wouldn't be here right now. We certainly would  
16 have been already engaged in whatever process we, we develop to  
17 have these documents reviewed by the agencies so they can  
18 assert their privilege or not with respect to these documents.

19 So, you know, perhaps counsel for OCC and FRB should  
20 weigh in and let the Court know what the agencies' position is  
21 as to how the review of these documents ought to occur so that  
22 we can tee up the privilege issues which aren't before the  
23 Court today. There is no -- there hasn't been a claim of  
24 privilege asserted yet, and it isn't the agencies' fault that  
25 hasn't occurred because the *Touhy* process wasn't invoked.

1           THE COURT: All right. Ms. Levenson, let me hear  
2 from you.

3           MS. LEVENSON: Thank you, Your Honor. I think as a,  
4 as a practical matter, the agencies need to find a way to at  
5 the very least make a first cut through documents to give some  
6 guidance as to what Capital One may produce without the  
7 agencies invoking privilege over and what the agencies will  
8 actually invoke privilege over.

9           And in a third category, and hopefully this will  
10 expedite the process, the agencies can also in performing this  
11 review consider whether or not there's any, any documents over  
12 which it might waive the privilege, and that is the practical  
13 effect of the *Touhy* regulations in this instance, that the  
14 plaintiffs would put forward the information that the agencies  
15 would need to analyze whether or not any privilege could be  
16 waived, and then the agencies would be able to provide a  
17 meaningful decision to the Court. Otherwise, the agencies are  
18 left to guess what the, you know, at what the plaintiffs need  
19 from these documents and why they can't get the information  
20 anywhere else.

21           We did discuss with Mr. Balser the possibility of at  
22 least a first cut of an exemplar process in view of the speed  
23 of this -- the nearing close of document discovery in this  
24 case. I think it might be useful for the agencies to at least  
25 look at a representative sample of documents in order to tell

1 Capital One we're not going to assert privilege over these  
2 documents. That may help move the process along more quickly  
3 and -- but -- and while allowing the agencies to assert  
4 privilege over documents that are legitimately within the bank  
5 examination privilege.

6 We would take issue with plaintiffs' argument and  
7 plaintiffs themselves have admitted that internal  
8 communications be released without any further review given the  
9 possibility that, as you say, potential cut and pasting of  
10 those recommendations could, could exist within the documents.

11 The agencies would like to work on -- would like to  
12 do this review as expeditiously as possible, and that is why we  
13 have suggested an exemplar process here.

14 THE COURT: Well, you know, this, this, this -- the  
15 *Touhy* regulations, you know, are supposed to keep the agencies  
16 from having to, you know, conserve government resources, but  
17 apparently the agencies have taken a position that they want to  
18 come in and try and have the opportunity to determine whether  
19 the privilege applies in this case, and again, it's the  
20 privilege that we're looking at as to whether it applies on  
21 these documents that Capital One has withheld from production,  
22 and so, you know, I'm going to give the agencies what they have  
23 asked for, and that is, an opportunity to come in and decide  
24 whether to assert a privilege and to support the assertion of  
25 that privilege, and it will be for me to decide if the issue

1 can't be resolved among the parties as to whether that is an  
2 appropriate application of the privilege or whether it should  
3 be overcome for some reason even if it is an appropriate  
4 application of privilege.

5           The privilege is a qualified one. It only relates to  
6 certain types of information, and if you look at both the  
7 *Bankers Trust* and the *Subpoena* case out of D.C., you know, they  
8 both refer to it doesn't contain factual information. It does,  
9 you know, have to do with certain deliberative processes.

10           We have a very strong protective order in this case,  
11 which is a consideration that I think the agencies have to take  
12 into consideration in making their determination, but, you  
13 know, this can't be done on a representative basis. It has to  
14 be done if Capital One has withheld documents and the agencies  
15 want to assert a privilege and tell them not to produce those  
16 documents, they have to support that, and they have to support  
17 that on a document-by-document basis, and that's what they've  
18 asked for, to come in and, you know, either assert a privilege  
19 or not assert a privilege. So that can't be done broad-based.

20           I'm going to give them two weeks to do it. Capital  
21 One needs to provide them with the documents, if they haven't  
22 already, that they have withheld. So you've got, you know, the  
23 e-mails and the attachments and things like that that relate to  
24 the privileges that have been withheld from both the Federal  
25 Reserve and the Office of the Comptroller of the Currency



1 within two weeks, two weeks from today. They need to provide a  
2 privilege log that indicates which documents they are asserting  
3 a claim of the bank examination privilege and the basis for  
4 that on those documents. You know, if they don't assert a  
5 privilege, then the documents, you know, are subject to being  
6 produced.

7 I'm not finding categorically that the internal  
8 e-mails could not be subject to the bank examination privilege.  
9 I can see circumstances where they very well may be, and I want  
10 to give the agencies -- and again, this is the agencies, not  
11 Capital One, and so it's the agencies who have to make that  
12 determination. This is not something that, you know, is done  
13 in conjunction with Capital One. They're the ones who have to  
14 assert this privilege, and they're the ones who have to come to  
15 the Court and support it once it gets asserted.

16 So, you know, I -- that's a short time period; I  
17 understand. This is an issue that has been brewing for a very  
18 long time. It's an issue that, you know, I, I think the  
19 agencies talk about their free-flowing information, all this  
20 kind of information that they have consistently, so it's  
21 important for them to -- they know about this. This is not a  
22 surprise to them.

23 The idea that, you know, I think the case, and I  
24 can't remember -- the union case that we discussed, you know,  
25 we have gotten to the point where there's no need to have a

1 letter sent to the agencies. The agencies have intervened in  
2 this case. They have the document requests. They've actually  
3 cited the document -- one of the document requests in their  
4 papers that they've filed with the Court.

5           So the time has come for them to make the decision,  
6 and so the request has been made. You've got two weeks in  
7 order to provide a log to Capital One and to the plaintiffs  
8 indicating which documents you're going to contend that you're  
9 going to assert a privilege, after a communication and  
10 discussions with the plaintiffs, if you're unable to agree on  
11 whether that log adequately asserts a privilege or you want to  
12 fight over that issue so you can deal with it in a separate  
13 motion.

14           I think that's really the best way that we can go  
15 through in doing this. You know, this ruling does not cover --  
16 and I, you know, I know from the chart that I think was in  
17 Ms. Solomon's declaration that there aren't any documents that  
18 are being withheld that were solely based on FDIC or the  
19 Consumer Financial Protection Bureau, but to the extent that  
20 there are documents that are only related to those agencies,  
21 you know, they have to be produced. They had time to come in,  
22 assert their claims, make their case for doing certain things.  
23 They didn't do it in a timely manner.

24           So, you know, obviously, if a, if a document went to  
25 both, you know, the Federal Reserve and to the FDIC, that

1 document may be subject to a privilege even though it went to  
2 the FDIC, but if they're materials that went only to those  
3 other two agencies, they need to be produced. Okay?

4 MR. KOCH: Your Honor, if I may -- Peter Koch from  
5 the OCC. Your Honor, I just want to point out a couple of  
6 points here. Your Honor, there is a significant amount of  
7 materials, I think we've been told perhaps up to 70,000  
8 documents. That is -- it's very difficult to, I think, for the  
9 OCC and the Federal Reserve to marshall the resources to go  
10 through 70,000 documents in a two-week period.

11 One of the purposes of our motion to intervene was to  
12 ask the Court to instruct the plaintiffs to follow the *Touhy*  
13 process, which is a process to conserve agency resources. Your  
14 Honor, at this point, we have not received any information from  
15 the plaintiffs as to why they believe nonpublic OCC information  
16 or Board CSI should be disclosed for purposes of, of this  
17 action. Those are requirements that are in our *Touhy*  
18 regulations.

19 THE COURT: Mr. Koch, you -- Mr. Koch, I don't allow  
20 two parties -- I mean, two lawyers to argue a position. I  
21 asked who was going to be presenting the argument on behalf of  
22 the agencies. Ms. Levenson said she was going to be presenting  
23 the argument. This is not a tag team.

24 So, you know, I've made my ruling. You've asked for  
25 this. You wanted to come in. You wanted to intervene. You

1 said you would do it expeditiously in your papers, and I'm  
2 going to require you to do it expeditiously, your papers. You  
3 know, we're talking about a set of documents that have been  
4 withheld as of this date, you know. That's what you need to  
5 do, and you need to do that within two weeks. Okay?

6 Anything else from the parties?

7 MS. PERKINS: No, Your Honor.

8 MR. SIEGEL: Nothing from plaintiffs, Your Honor.

9 THE COURT: Okay. Thank you, counsel.

10 MR. SIEGEL: Thank you.

11 MS. PERKINS: Thank you, Your Honor.

12 (Which were all the proceedings  
13 had at this time.)

14  
15 CERTIFICATE OF THE REPORTER

16 I certify that the foregoing is a correct transcript of  
17 the record of proceedings in the above-entitled matter.

18  
19  
20 /s/

21 \_\_\_\_\_  
Anneliese J. Thomson